Nos. 99-1388
99-1389

Supreme Court, U.S.
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In the

Supreme Court of the United States

PHELPS DODGE CORPORATION, ET AL.,

Petitioners,

v.

THE UNITED STATES, ET AL.,

Respondents.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, ET AL.,

Petitioners,

v.

THE UNITED STATES, ET AL.,

Respondents.

On Petitions for Writs of Certiorari to the Supreme Court of the State of Arizona

RESPONSE OF THE STATE OF ARIZONA IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 2

I. Factual and Legal Background 2

A. In Arizona, Groundwater Is an Essential, Non-renewable Resource 2

B. Arizona Law Has Adapted to Provide Effective Groundwater Management Appropriate to Local Circumstances 4

II. The Proceedings Below 10

REASONS FOR GRANTING A WRIT OF CERTIORARI 13

I. The Decision Below Is Inconsistent With Decisions of this Court and of the Supreme Court of Wyoming 13

II. The Decision Below Unnecessarily Displaces State Law and Impairs State Management of Groundwater Resources, Contrary to Established Federal Policies of Deference to State Water Law 15

III. This Court Should Settle the Important Question of Whether The Implied-Reservation-of-Water-Doctrine Extends to Groundwater to Reduce the Substantial Uncertainties Affecting Millions of Americans in Western States 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arizona v. California, 373 U.S. 546 (1963).....12, 21

California v. United States, 438 U.S. 645 (1978) 17, 22

Cappaert v. United States, 426 U.S. 128 (1976).... 12, 14, 19

Central Arizona Water Conservation Dist. v. United States, 32 F. Supp. 2d 1117 (D. Ariz. 1998) 9

Cherry v. Steiner, 543 F. Supp. 1270 (D. Ariz. 1982)..... 6, 8, 9

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 21

United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)..... 17

United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) 17, 20

United States v. New Mexico, 438 U.S. 696 (1978)..... 13

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) 20

Winters v. United States, 207 U.S. 564 (1908) .. 12, 13, 14

STATE CASES

Bristor v. Cheatham, 255 P.2d 173 (Ariz. 1953).. 8, 14, 22

City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912 (1929) 17

Fain Land & Cattle Co. v. Hassell, 790 P.2d 242 (Ariz. 1990) 18

TABLE OF AUTHORITIES – Continued

Page

In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source, 857 P.2d 1236 (1993) 10, 14

In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source, 989 P.2d 739 (Ariz. 1999) ..... *passim*

In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76 (Wyo. 1988) 13, 21

In the Matter of the Rights to the Use of the Gila River, 830 P.2d 442 (Ariz. 1992) 11

Lassen v. Arizona, 385 U.S. 458 (1967) 18

Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co., 4 P.2d 369 (Ariz. 1931) 15

Town of Chino Valley v. City of Prescott, 638 P.2d 1324 (Ariz. 1982) 8, 14

United States v. Superior Court, 697 P.2d 658 (Ariz. 1985) 3

FEDERAL STATUTES

Act of Sept. 9, 1850, §§ 2, 15, 9 Stat. 446, 447, 452 18

Act of Feb. 24, 1863, §§ 1-2; 12 Stat. 664, 665 18

Arizona-New Mexico Enabling Act, Act of June 20, 1910, 26 Stat. 557, 572 (1910) 18

McCarran Amendment, 43 U.S.C. § 666 10

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

A.R.S. § 45-108 8
A.R.S. § 45-141 ..... 9, 10
A.R.S. § 45-251(2) 10
A.R.S. § 45-251(7) 10
A.R.S. § 45-401 5
A.R.S. §§ 45-401 to -704 5
A.R.S. § 45-402(2) 6
A.R.S. § 45-403 8
A.R.S. § 45-411(A) 7
A.R.S. § 45-411.03 7
A.R.S. § 45-412(A)(1) 7
A.R.S. § 45-431 8
A.R.S. § 45-437 8
A.R.S. § 45-452 8
A.R.S. § 45-453 8
A.R.S. §§ 45-491 to -498 7
A.R.S. § 45-492 7
A.R.S. § 45-493(A) 7
A.R.S. § 45-493(B) 7
A.R.S. § 45-493(C) 8
A.R.S. § 45-497 7
A.R.S. §§ 45-541 to -559 8

TABLE OF AUTHORITIES – Continued

Page

A.R.S. § 45-561(12) 6

A.R.S. § 45-562 6

A.R.S. § 45-562(B) 6

A.R.S. § 45-591 to -605 8

A.R.S. §§ 45-801.01 to -891.01 10

A.R.S. §§ 45-2401 to -2472 10

EXECUTIVE ORDERS

Proclamation No. 7263, 65 Fed. Reg. 2817 (2000) 19

OTHER AUTHORITIES

T.W. Anderson, et al., U.S. Geological Survey, Professional Paper 1406-B, *Geohydrology and Water Resources of Alluvial Basins in South-Central Arizona and Parts of Adjacent States*, B26 (1992) 5

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2 Arizona Dep't of Water Resources, *Arizona Water Resources Assessment, Hydrologic Summary* 47 (1994) 2

Arizona Dep't Water Resources, *Technical Report on De Minimis Adjudication of Domestic Stock Pond and Other Stockwatering Uses in San Pedro River Watershed* (1993) 9

Bonnie G. Colby, et al., *Economics of Water Scarcity, in Ensuring Arizona's Water Quantity and Quality Into the 21st Century* (1997) 9

TABLE OF AUTHORITIES – Continued

Page

1 John A. Folk-Williams, *What Indian Water Means to the West, Water in the West* (1982) 2

Robert Jerome Glennon, *Because That's Where the Water Is: Retiring Current Water Uses to Achieve the Safe-Yield Objective of the Arizona Groundwater Management Act*, 33 Ariz. L. Rev. 89 (1991) 7

Jeffrey Gross, *Transboundary Water Quantity: The Effect of Arizona and Mexican Groundwater Law on Arizona's Agriculture*, 1988 Ariz. J. Int'l & Comp. L. 189 5

David A. de Kok, *The Geography of Water Availability and Use in Arizona, in Ensuring Arizona's Water Quantity and Quality Into the 21st Century* 30 (1997) 4

Thomas H. Pacheco, *How Big is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, 15 Ecology L.Q. 627 (1988) 20

Peter W. Sly, *Reserved Water Rights Settlement Manual* (1988) 18

John E. Thorson, *Resolving Conflicts Through Intergovernmental Agreements: The Pros and Cons of Negotiated Settlements*, in *Indian Water 1985: Collected Essays* (1986) 2

U.S. Geological Survey, *Annual Summary of Ground-Water Conditions in Arizona, Spring, 1984 to Spring 1985*, USGS Open-File Report 86-422W (1986) 4

Water Resources Research Center, University of Arizona, *How Western States Manage Interconnected Groundwater and Surface Water* (1994) 17

Western Water Policy Review Advisory Commission Rep., *Water in the West: Challenge for the Next Century* (1998) 2, 3, 4, 10, 16, 22

INTRODUCTION

The State of Arizona agrees with Petitioners that this Court should grant certiorari to settle a question of vital importance to the rapidly increasing populations of Arizona and other arid western states: How should federal water needs be integrated into a non-appropriative state groundwater management scheme? In answer to the question, the Arizona Supreme Court extended to groundwater the federal reserved-right-to-water doctrine that this Court had previously applied only to appropriable surface waters. *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 989 P.2d 739, 751 (Ariz. 1999) ("*Gila River III*").

The court arrived at this answer in error because it failed adequately to consider two important aspects of Arizona water law. First, the court did not consider it significant that Arizona law does not authorize the appropriation of groundwater, although heretofore an appropriative scheme has been an essential predicate to this Court's implication of a reserved right. Second, the court disregarded the State's comprehensive statutory scheme to manage its groundwater as a public resource, which fairly allocates groundwater supplies while ensuring that no party, federal or state, drains an aquifer dry. Consequently, the *Gila River III* decision unnecessarily displaced state law and created a class of federal rights with priority over all other rights and the arguable legal right to drain completely an aquifer on which many mutually depend. This rule unfairly prefers federal water users and interferes with Arizona's ongoing groundwater management strategies. This Court should review the

Gila River III decision to clarify the parameters of the reserved-right-to-water doctrine for the benefit of Arizona and the many courts and litigants adjudicating water rights throughout the West.

STATEMENT OF THE CASE

I. Factual and Legal Background.

A. In Arizona, Groundwater Is an Essential, Non-renewable Resource.

Precipitation in the West is both infrequent and highly variable.[1] Surface water supplies are therefore scarce, and frequently are over-appropriated.[2] "Water

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[1] Western Water Policy Review Advisory Commission Rep., *Water in the West: Challenge for the Next Century* at 2-4 (1998) (hereafter "*Water in the West*"). For example, although the mean annual flows of the Colorado River at Lees Ferry have been approximately 10.4 million acre-feet since the construction of Glen Canyon Dam, annual flows vary from a record low of approximately 4.4 million acre-feet to a record high of approximately 20.4 million acre-feet. 2 Arizona Dep't of Water Resources, *Arizona Water Resources Assessment, Hydrologic Summary* 47 (1994) (hereafter "*Assessment, Vol. II*").

[2] In approximately half of the American West, as of 1986, water use exceeded stream flow during years of average precipitation. John E. Thorson, *Resolving Conflicts Through Intergovernmental Agreements: The Pros and Cons of Negotiated Settlements, in Indian Water 1985: Collected Essays*, 25, 26-27 (1986). The Gila and Salt Rivers, which are the subject of this action, are fully appropriated and inadequate to meet the region's water needs. John A. Folk-Williams, *What Indian Water Means to the West, 1 Water in the West* (1982) (hereafter "*What Indian Water Means to the West*"), at 34, 36.

usage in Arizona exceeds available surface supply by three-fold in average years and by more in dry years." *United States v. Superior Court*, 697 P.2d 658, 663 (Ariz. 1985).

Scarce water is becoming ever more precious due to explosive population growth.[3] These new residents have collected in a series of "urban archipelagos" – areas of high population density surrounded by large, sparsely populated rural areas, in many cases far from available surface water. *Water in the West*, at 2-15. Water often must be moved many miles from its point of origin to point of use, and must be stored during years of plenty so that it will be available in times of drought. 1 Arizona Dep't of Water Resources, *Arizona Water Resources Assessment, Inventory and Analysis* at 52 (1994) (hereafter "*Assessment, Vol. I*"). Many Arizona communities with no renewable water supplies rely primarily on groundwater because they have "no practical, affordable alternative." *Assessment, Vol. I*, at 52. In fact, groundwater "is the primary water supply in most areas of the State." *Assessment, Vol. I*, at 9. From 1986-1990, groundwater accounted for approximately 50% of all water use in Arizona. *Id.* at 10.

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[3] The West is now home to nearly one-third of the American population. *Water in the West*, at 2-14. Over the past 25 years the populations of western states grew at a rate almost twenty times that of the rest of the nation, and the West is projected to add another 28 million residents by the year 2025. *Id.* Between 1990 to 1994, Arizona was the third-fastest growing state in the nation, with a population growth rate of 11.2%, and populations concentrated in the Phoenix and Tucson metropolitan areas. *Id.*

Other western states also depend heavily upon groundwater.[4]

Fortunately a vast reservoir of underground water underlies virtually the entire State of Arizona.[5] The U.S. Geological Survey has estimated that Arizona has approximately 1.9 billion acre-feet of water stored underground. David A. de Kok, *The Geography of Water Availability and Use in Arizona, in Ensuring Arizona's Water Quantity and Quality Into the 21st Century* 30, 34 (1997) (hereafter *"The Geography of Water Availability"*). Although there is some natural and artificial groundwater recharge, most of Arizona's groundwater reservoir has been in storage for thousands of years. *Assessment Vol. I*, at 9.

Flexible strategies to manage groundwater and surface water in a coordinated way that makes water available at the right time and place to meet demand are essential to allow continued economic growth and development throughout the State. *Assessment, Vol. I*, at 52-53.

B. Arizona Law Has Adapted to Provide Effective Groundwater Management Appropriate to Local Circumstances.

Arizona today administers its groundwater resources under one of the most comprehensive groundwater

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[4] Groundwater contributes about one third of the total water supply in the 19 western states, and approximately 87% of the self-supplied domestic water. *Water in the West*, 2-7.

[5] U.S. Geological Survey, *Annual Summary of Ground-Water Conditions in Arizona, Spring 1984-1985*, USGS Open-File Report 86-422W (1986); Appendix to Petitions for Writs of Certiorari ("App."), App. G.

management systems in the United States.[6] The Arizona Legislature enacted the Arizona Groundwater Code, Arizona Revised Statutes ("A.R.S.") §§ 45-401 to -704, in 1980 after decades of groundwater overdraft led to significant decline in water tables in some critical areas.[7] The Legislature has acknowledged the State's dependence upon groundwater and the dangers of aquifer depletion, and has set a goal of balancing withdrawals and recharges of those aquifers by the year 2025. *See* A.R.S. § 45-401; *Assessment, Vol. I* at 55-56. This balance is to be achieved

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[6] One commentator has referred to the Groundwater Code as "[p]erhaps the most comprehensive groundwater code in the nation." Jeffrey Gross, *Transboundary Water Quantity: The Effect of Arizona and Mexican Groundwater Law on Arizona's Agriculture*, 1988 Ariz. J. Int'l & Comp. L. 189, 190.

[7] Extensive groundwater pumping began shortly after the development of efficient turbine pumps. T.W. Anderson, et al., U.S. Geological Survey, Professional Paper 1406-B, *Geohydrology and Water Resources of Alluvial Basins in South-Central Arizona and Parts of Adjacent States* 26 (1992). In 1923 pumping exceeded 500,000 acre-feet per annum and exceeded for the first time natural recharge. Pumping increased to 1 million acre-feet in 1934, 2 million acre-feet in 1945, 3 million acre-feet in 1948, 4 million acre-feet in 1953, and 5 million acre-feet in 1961, reaching an all-time high of 5.7 million acre-feet in 1974. *The Geography of Water Availability.* Prolonged periods of uncontrolled groundwater pumping between the late 1940's and the late 1970's and cumulative groundwater overdraft led to significant declines in water tables in some critical basins. Declines of 50 to 200 feet were common in the Central Arizona basin, and in some locations the water table dropped almost 500 feet. *Water in the West*, p. 2-7; *The Geography of Water Availability*, at 32-33, 36.

in part by providing for the orderly retirement of agriculture in critical groundwater basins.[8] Arizona's adoption of this comprehensive Groundwater Code, and its commitment to the Central Arizona Project ("CAP") and concomitant restrictions on groundwater use,[9] demonstrate that Arizona recognizes the importance of groundwater and will take appropriate action to conserve this precious, non-renewable resource.

The Groundwater Code establishes three levels of water management. Management is most intensive in Active Management Areas ("AMAs"), which are geographic areas where groundwater supplies are being depleted. *See* A.R.S. § 45-402(2). Each AMA is assigned a groundwater management goal that is designed to ensure the sustainability of Arizona's groundwater supplies. A.R.S. § 45-562.[10] The Groundwater Code initially established four AMAs, which accounted for 69 percent of the total groundwater overdraft in the state and included 80 percent of the State's population.[11] By amendment to the

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[8] Agriculture accounted for 79.7% of total demand for Arizona's water in 1990; that percentage is projected to decrease to 72.8% of total demand by 2015, and 66.2% of total demand by 2040. *See Assessment, Vol. I*, at 16-17.

[9] *See Assessment, Vol. I* at 55-56.

[10] Achievement or maintenance of "safe-yield," or long-term balance between annual withdrawals and recharge, is the management goal of the Phoenix, Tucson, Prescott and Santa Cruz AMAs. See A.R.S. §§ 45-561(12), -562. The management goal in the Pinal AMA is to allow some depletion "consistent with the necessity to preserve future water supplies for non-irrigation uses." A.R.S. § 45-562(B).

[11] *Cherry v. Steiner*, 543 F. Supp. 1270, 1278-79 (D. Ariz. 1982), *aff'd*, 716 F.2d 687 (9th Cir. 1983). The Tucson, Phoenix,

Code a fifth AMA was established in 1994.[12] The Department of Water Resources is authorized to establish additional AMAs where "necessary to preserve the existing supply of groundwater for future needs." A.R.S. § 45-412(A)(1). Within AMAs new uses of groundwater are generally prohibited or severely limited.[13]

The management of agricultural irrigation, both within and outside of AMAs, is also intensive. To meet the water demands of its burgeoning population without depleting non-renewable groundwater supplies Arizona already has taken painful steps to reduce agricultural uses, which have accounted for most groundwater pumping.[14] The Groundwater Code prohibits irrigation of lands that were not historically irrigated both within

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Prescott and Pinal AMAs were established as of June 12, 1980. A.R.S. § 45-411(A).

[12] The Santa Cruz AMA was established as of July 1, 1994. A.R.S. § 45-411.03.

[13] *See* A.R.S. § 45-491 to -498. While new withdrawals for domestic uses are permitted under A.R.S. § 45-492, no additional industrial uses will be allowed, except where designed to require maximum conservation. *See* A.R.S. § 45-497. Industrial users will be required to purchase and retire irrigated lands if available. *Id.* Municipalities and water companies may withdraw enough water within their service areas to serve their customers, but are restricted from extending their service areas and the types of services that they provide. *See* A.R.S. §§ 45-493(A) & (B).

[14] Robert Jerome Glennon, *Because That's Where the Water Is: Retiring Current Water Uses to Achieve the Safe-Yield Objective of the Arizona Groundwater Management Act*, 33 Ariz. L. Rev. 89, 90-91 (1991).

AMAs and outside of AMAs in areas known as "irrigation non-expansion areas" ("INAs"), where expanded withdrawals of groundwater cannot safely be supported. *See* A.R.S. §§ 45-431, -437, -452, and 45-493(C); *Cherry*, 543 F. Supp. at 1275. The Groundwater Code thus prevents expansion of the agricultural land base in those parts of the state where groundwater supplies are imperiled. As urbanization reduces the agricultural land base, groundwater consumption will also decline and renewable water supplies that have been used for agriculture will become available for other uses.

The third level of management includes laws that are generally applicable statewide. *See, e.g.*, A.R.S. § 45-403 (designation of groundwater basins); A.R.S. §§ 45-541 to -559 (restrictions on transporting groundwater from one area of the State to another); A.R.S. §§ 45-591 to -605 (mandatory well registration and construction requirements); A.R.S. § 45-108 (requirements for land developers to evaluate and report water availability, with restrictions on development in areas without an "assured water supply"). These laws operate in tandem with the doctrine of reasonable use that is applicable outside of AMAs and INAs. A.R.S. § 45-453. This doctrine allows a landowner the right to put the land to use, whether it be for irrigation, industrial enterprise or domestic homesteading, and to extract a reasonable amount of the common groundwater supply to accomplish that use. *See* A.R.S. § 45-453; *Bristor v. Cheatham*, 255 P.2d 173, 180 (Ariz. 1953). Even in these rural areas, however, landowners merely have a right to the usufruct of the nonappropriable groundwater. *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324, 1328 (Ariz. 1981). The water itself is a state resource and the

right to use it is subject to state regulation. A.R.S. § 45-141; *Cherry*, 543 F. Supp. at 1275.

Reasonable use does not equate to excessive use. Arizona has studied water use outside AMAs and found that in such "reasonable use" areas the scarcity of water, concern for sustainability, and the cost of developing water are more significant limitations on use than a comprehensive regulatory scheme. One study shows that per-household domestic use was .5 acre-feet per year, below the standards set in many AMAs. Arizona Dep't Water Resources, *Technical Report on De Minimis Adjudication of Domestic Stock Pond and Other Stockwatering Uses in San Pedro River Watershed* (1993), at Appendix A-3. If more comprehensive regulation is needed to address changing circumstances, the State can regulate water use administratively or through legislation tailored to fit the changed circumstances.

Arizona already has achieved significant reductions in groundwater diversions. Total annual groundwater diversions in the four AMAs have declined from 3,166,000 acre-feet per annum during the period from 1971-1975 to 1,760,000 acre-feet per annum during the period from 1986-1990. *Assessment, Vol. I*, p. 70. The State also has taken very significant actions to enhance water supplies.[15]

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[15] Such measures include the construction of the Central Arizona Project ("CAP"), *Assessment Vol. I* at 55-56; *see generally Central Arizona Water Conservation Dist. v. United States*, 32 F. Supp. 2d 1117, 1122-23 (D. Ariz. 1998). They also include establishment of the Arizona Water Banking Authority to store Colorado River water in the state's central aquifers, *see* Bonnie

Arizona's Groundwater Code mandates safe-yield or sustainability in active management areas, limits new irrigation, and allows reasonable use in remote, rural areas until a need develops for more active management of the groundwater supplies. By protecting the common supply of groundwater Arizona law protects the interests of federal reservations in such water.

II. The Proceedings Below.

The decision below is the latest in a series of opinions arising from the Gila River General Stream Adjudication, in which the Arizona Supreme Court has established certain ground rules for Arizona's general stream adjudications.[16] *See Gila River III*, 989 P.2d 739; *In re the Gen.*

G. Colby, et al., *Economics of Water Scarcity, in Ensuring Arizona's Water Quantity and Quality Into the 21st Century* 108 (1997); A.R.S. §§ 45-2401 to -2472; the "Recharge Program," which allows entities with surplus renewable water supplies to store that water in underground aquifers, *see* A.R.S. §§ 45-801.01 to -891.01; *Water in the West*, p. 3-10; *The Geography of Water Availability* at 93; and regulatory programs to encourage effluent use as part of the AMA management plans. *Id.* at 94.

[16] In Arizona a "general stream adjudication" is "an action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source." A.R.S. § 45-251(2). The statute defines a "river system and source" to be "all water appropriable under § 45-141 and all water subject to claims based upon federal law." A.R.S. § 45-251(7). Arizona's general stream adjudications therefore encompass two types of water: waters that are "appropriable" and waters that are "subject to claims based upon federal law." The United States and several Indian tribes were joined as parties to the adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666.

Adjudication of All Rights to Use Water in the Gila River Sys. and Source, 857 P.2d 1236 (Ariz. 1993) ("*Gila River II*"); *In the Matter of the Rights to the Use of the Gila River*, 830 P.2d 442 (Ariz. 1992) ("*Gila River I*").

Due to the unparalleled size and scope of the case, *see Gila River I*, 830 P.2d at 446, the trial court understandably was reluctant to spend decades adjudicating tens of thousands of individual claims according to the wrong legal standards. Accordingly, the trial judge identified eight legal issues to be resolved before individual claims were adjudicated, and decided those issues after hearings and briefings which focused on the connection between groundwater and surface water. App. D2-D3. The trial court ruled, among other things, that "federal reserved water rights apply to both surface water and groundwater sources on and off the reservation whose diversion affects reservation sources, to the extent that there is not enough water left to satisfy the reservation's purpose, or P.I.A. [Practically Irrigable Acreage] if the land is an Indian reservation." App. D23. The trial court did not consider or discuss evidence of the purposes and needs of any specific federal reservation. App. D16-D23.

The Arizona Supreme Court granted review of the trial court's ruling on federal reserved water rights as two of six issues that it "reformulated" in an order granting interlocutory review. See Orders Concerning Petitions for Interlocutory Review, App. B.[17] In the decision below,

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[17] Interlocutory review was granted pursuant to a special procedural order that provided for expedited appellate review of trial court decisions of important legal issues in the case. The procedural order is reproduced as Appendix A to the *Gila River I* decision, and at App. C.

the court began with the proposition that a reserved right to water will be implied where the purpose of a federal reservation of land would otherwise be defeated, citing *Winters v. United States*, 207 U.S. 564 (1908), and *Arizona v. California*, 373 U.S. 546 (1963). The court expressed concern that "some reservations lack perennial streams," and thus their purpose could be frustrated without access to groundwater. *Gila River III*, 989 P.2d at 746. On the basis of *Cappaert v. United States*, 426 U.S. 128 (1976), the Arizona Supreme Court reasoned that this Court would not differentiate between surface and groundwater when identifying the source of a federal reserved right. *Gila River III*, 989 P.2d at 746. Finally, the court concluded that it could not defer to state law on this issue, because the doctrine of reasonable use would allow impairment of federal access to groundwater, as indicated by the historic depletion of groundwater in the absence of other legal constraints. *Gila River III*, 989 P.2d at 748. The opinion was almost devoid of discussion of the Groundwater Code, although a number of federal reservations border AMAs and therefore benefit from the statutory restrictions on groundwater use.[18] The Arizona Supreme Court held that "[f]ederal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation." *Gila River III*, 989 P.2d at

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[18] For example, the Gila River Indian Reservation is situated between the Phoenix and Pinal AMAs; the Tohono O'Odham Reservation borders the Tucson and Santa Cruz AMAs, and the Yavapai Prescott reservation borders the Prescott AMA. *Assessment, Vol. I*, at 68, 84; App. I.

751. In effect, the court equated need for water with need for a reserved right.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. The Decision Below Is Inconsistent With Decisions of this Court and of the Supreme Court of Wyoming.

This Court should grant certiorari to correct the Arizona Supreme Court's misapplication of prior decisions of this Court, and to resolve the conflict between the decision of the Arizona Supreme Court in *Gila River III* and the decision of the Wyoming Supreme Court in *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988) ("*Big Horn*"), which properly reached the opposite conclusion. 753 P.2d at 99-100.

Gila River III is an unwarranted extension of this Court's precedents regarding federal reserved rights to water. This Court has previously implied reserved water rights on a case-by-case basis only where absolutely necessary to prevent the frustration of the purpose of a particular federal reservation under state law schemes that allocated water based upon priority of use. *See United States v. New Mexico*, 438 U.S. 696, 700 (1978). Such rights are implied only after careful review of the underlying legal instruments by which the particular reservation was created. *See Winters*, 207 U.S. at 575-76 (existence of federally reserved rights "turns on the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation."). Moreover, this Court has never applied the *Winters* doctrine to groundwater; in fact, it has

carefully refrained from doing so. *See Cappaert*, 426 U.S. at 138, 142.

Notwithstanding this Court's restrained and careful approach to implied reserved rights, the Arizona Supreme Court concluded that a reserved right to groundwater should be implied based upon *Cappaert*, 426 U.S. at 138. *Gila River III*, 989 P.2d at 745. Although the existence of water available for appropriation was essential to the *Cappaert* analysis, the court ignored language in *Cappaert* referring to the reservation of *unappropriated* water, which strongly suggests that the *Winters* doctrine should only be applied where water is allocated under the doctrine of prior appropriation. *Cappaert*, 426 U.S. at 139. The Arizona Supreme Court inexplicably did not analyze the issue of whether groundwater that is *not appropriable* under state law is *available for appropriation* and therefore subject to the federal reserved rights doctrine.

Arizona adopted a bifurcated system of water rights. Surface water and a narrowly defined subflow zone that is directly associated with the stream are subject to the doctrine of prior appropriation. Percolating groundwater, *i.e.*, underground water that is not directly associated with a stream, cannot be appropriated under Arizona law. *Bristor*, 255 P.2d at 177. Instead, it is considered a common supply that is equally available to the owners of overlying lands, for use on those lands, limited by the common law doctrine of reasonable use and state statutory law. *Gila River II*, 857 P.2d 1236, 1240; *Town of Chino Valley*, 638 P.2d at 1328. Arizona's bifurcated system reflects its deliberate policy choice to encourage decentralized development of a limited water supply and to

discourage the monopolization of control over water. *Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 4 P.2d 369, 373 (Ariz. 1931).

Instead of concluding that there can be no federal reserved right to groundwater in Arizona because groundwater is not available for appropriation, the Arizona Supreme Court in *Gila River III* found that all groundwater in the State is "unappropriated and thus available" to be reserved for federal use. Such a rule gives federal interests an unintended priority over all other groundwater users, based on a legal doctrine that is predicated on a need – the need to reserve water essential for federal purposes from prior appropriation by non-federal entities – that does not exist where groundwater is not subject to prior appropriation under state law. Significant inequities, uncertainties, inter-governmental conflicts, and interference with the State's management of a shared public resource is likely to result. This Court should grant certiorari to clarify that the federal reserved-right-to-water doctrine does not apply to groundwater that is not appropriable under state law.

II. The Decision Below Unnecessarily Displaces State Law and Impairs State Management of Groundwater Resources, Contrary to Established Federal Policies of Deference to State Water Law.

In holding that federal reserved rights extend to groundwater and therefore take priority over other uses, the Arizona Supreme Court unnecessarily displaced state law and impaired the State's ability to manage its groundwater resources. The Court should grant certiorari

to clarify that federal law does not displace state water law unless the application of state law would frustrate federal purposes, because water management is best accomplished through state law that can be tailored to local needs. As the Water Policy Review Advisory Commission[19] stated in its 1998 report:

> Achieving sustainable groundwater use is one of the major water management challenges facing the West. This is primarily a state rather than a federal responsibility. Even though it is widely understood that ground- and surface-water resources are interrelated, most states continue to manage ground and surface water by different legal regimes. The majority of western states administer surface waters under the doctrine of prior appropriation or by a mixed appropriative-riparian system. However, groundwater governance regimes display less uniformity and are typically far less well defined, making it more difficult for states to manage limited supplies.

Water in the West, p. 3-6.

Arizona is one of several states that apply prior appropriation principles only to surface water and a narrowly defined subflow zone that is directly associated

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[19] The Commission was appointed pursuant to a 1992 act of Congress to assist the President in fulfilling his responsibility to make findings and recommendations to Congress regarding federal activities in Western states that directly or indirectly affect the allocation and use of water resources. *Water in the West* at 1-2 to 1-5.

with the stream.[20] Over more than 100 years, Congress has deliberately allowed for the development and application of state water law, even on public lands. *See generally California v. United States*, 438 U.S. 645, 653-70 (1978). Congress purposefully deferred to state law in matters of water rights because, as then Representative Sutherland stated, "if the appropriation and use were not under the provisions of the State law the utmost confusion would prevail" and "[d]ifferent water rights in the same State would be governed by different laws and would frequently conflict." *Id.* at 667-68; *see also United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984). Such deference to state law is appropriate even where federal rights are at issue, so long as the federal purpose is not frustrated or impaired. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979).

Although states must protect federal interests in groundwater, this Court has never declared that federal law requires application of prior appropriation principles to groundwater, or that federal interests must be absolutely protected against the effects of water shortage without regard to the needs of other water users. Instead of imposing an inflexible rule to guaranty absolute protection of federal water rights, Congress and this Court have allowed states the flexibility to choose the most

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[20] The other states are California, Hawaii, Texas, Nebraska and Oklahoma. Water Resources Research Center, University of Arizona, *How Western States Manage Interconnected Groundwater and Surface Water* 3 (1994); *City Mill Co. v. Honolulu Sewer & Water Comm'n*, 30 Haw. 912 (1929).

appropriate methods for allocation and conservation of water, so long as federal interests are fairly accomodated.

Arizona has chosen to accommodate state and federal interests by maintaining a non-appropriative system of groundwater management. The State has considered this system adequate to protect its considerable property interests including 9.4 million acres of trust lands, which the State holds as trustee for the benefit of schools and other institutions.[21] These trust lands are located in all parts of the State, are largely undeveloped, are intermingled with private lands and federal reservations, and share access to underground aquifers. App. I, J. Although Arizona has asserted claims for water in the nature of a reserved right,[22] to date it has not asserted priority over other groundwater users on the basis of this reserved right, in the belief that its ownership of the overlying land affords reasonable use of the shared aquifers. There

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[21] Sections 16 and 36 of every township were reserved for the future state of Arizona when the Territory of New Mexico was created. Act of Sept. 9, 1850, §§ 2, 15, 9 Stat. 446, 447, 452. The reservation of lands was confirmed when the Territory of Arizona was created. Act of Feb. 24, 1863, §§ 1-2; 12 Stat. 664, 665. Upon its admission to the United States, Arizona was granted sections 2, 16, 32, and 36 in every township, or lands in lieu thereof where the numbered sections were unavailable, and certain additional lands. Arizona-New Mexico Enabling Act, Act of June 20, 1910, 26 Stat. 557, 572 (1910). These lands are held in trust subject to restrictions imposed by the Enabling Act and the Arizona Constitution. *Lassen v. Arizona*, 385 U.S. 458, 460 n. 2 (1967); *Fain Land & Cattle Co. v. Hassell*, 790 P.2d 242, 244 (Ariz. 1990).

[22] Peter W. Sly, *Reserved Water Rights Settlement Manual* (1988) at 45-46.

exists no logical or legal basis for affording greater protection to underground water needed by newly created national monuments than to underground water needed for development of the State's trust lands, or by the millions of people who settled in Arizona and became dependent upon groundwater for a myriad of uses.

The *Gila River III* decision would result in a system in which only federal water users have a date of priority. This results because one attribute of a federal reserved right is priority for the entire right over persons who appropriate water after the date of the reservation. *Cappaert*, 426 U.S. at 138. It may be argued that because Arizona does not allocate groundwater based upon priority of initiation of use, application of the reserved-right-to-water doctrine to groundwater in Arizona would mean that when supplies are low even the most recent federal uses would continue unabated while even the most long-standing state-law based uses would bear the entire burden of shortages.[23] It also might be argued that the *Gila River III* decision would allow any federal user to drain the common aquifer for a low value use, such as pasture

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[23] The establiishment of the Agua Fria National Monument by Presidential Proclamation on January 11, 2000, provides a good example of the potential problem caused by the *Gila River III* decision. Proclamation No. 7263, 65 Fed. Reg. 2817 (2000). The Proclamation reserves "subject to valid existing rights, a quantity of water sufficient to fulfill the purposes for which this monument is established." It is possible that federal representatives will assert that the *Gila River III* decision grants superior rights to groundwater to the Agua Fria National Monument, with a priority date of January 11, 2000, over groundwater pumping, lacking a priority date, that has historically occurred in the area under state law.

or irrigation, while local municipal wells in the same aquifer run dry. The decision also positions federal claimants to object to all off-reservation pumping, on the theory that every well interferes with superior federal reserved rights.[24]

These consequences could and should have been avoided, without jeopardizing federal water rights, by simply applying the non-discriminatory state law as the rule of decision, instead of creating a special federal rule. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671-72 (1979); *Kimbell Foods*, 440 U.S. at 728; Petition for Writ of *Certiorari* filed by Phelps Dodge Corporation, *et al.* at pp. 16-22.

III. This Court Should Settle the Important Question of Whether The Implied-Reservation-of-Water-Doctrine Extends to Groundwater to Reduce the Substantial Uncertainties Affecting Millions of Americans in Western States.

McCarran Amendment adjudications have been filed in Arizona and at least nine other states. Thomas H. Pacheco, *How Big is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, 15 Ecology L.Q. 627, 635 n. 48 (1988). Because such proceedings must adjudicate

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[24] The United States and various Indian tribes in fact filed over 11,000 objections to wells listed in the San Pedro River Hydrographic Survey Report on the basis that pumping by those wells interferes with or is subject to federal reserved rights. See objections on file at the Arizona Department of Water Resources identified with Special Master's Uniform Objection Code Nos. 561, 562, and 1134.

the rights of all claimants to water from a particular river system, they involve numerous parties and attorneys, and are both unwieldy and time-consuming.[25] All participants in general stream adjudications need to know the ground rules that will determine their rights. This Court's grant of certiorari would settle an important, unresolved question of federal law and reduce the likelihood that legal error will infect pending general stream adjudications for decades to come.

Federal reserved rights claims create a great deal of uncertainty about the rights of other water users, due to the size and number of federal claims[26] and the fact that the rights are unquantified because they are not based on actual, historical use. *See generally Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 824-25 (1976) (Stewart, J., dissenting). Delayed quantification of

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[25] The Gila River adjudication involves tens of thousands of litigants and has been pending for over 25 years. The Big Horn adjudication in Wyoming involved more than 100 attorneys in the first six years of litigation, and produced transcripts in excess of 15,000 pages and more than 2300 exhibits. *See Big Horn*, 753 P.2d at 85.

[26] Nearly three-fourths of the land in Arizona is owned by the federal government. App. A14, I, J. Over 3.3 million acre-feet of water have been claimed for Arizona's 19 Indian reservations, and additional claims have been asserted for national forests, parks, monuments, and other federal enclaves. In *Arizona v. California*, Indian reservations located along the Colorado River were awarded approximately 900,000 annual acre-feet and other federal enclaves in Arizona, including the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge, and the Lake Mead National Recreation Area, Arizona were awarded over 79,000 acre-feet per year. *Arizona v. California*, 373 U.S. 546, 598-600 (1963).

federal and tribal water rights leads to an inequitable situation for Indians and creates uncertainty for all other water users.[27] Because federal rights inescapably vie with other public and private claims for the limited quantities of water, delay also increases the likelihood that established uses, developed at considerable cost, will be disrupted.[28] Uncertainty hampers the resolution of these competing claims. As the Western Water Policy Review Advisory Commission warned:

> [M]any states have undertaken McCarran Amendment adjudications. These adjudications have proved to be long and costly and have not yet produced the desired quantification of existing rights. *The more uncertain rights are, the more water right holders resist participation in conflict resolution processes because of concerns that claimed rights will be diminished.*

Water in the West, 2-39 (emphasis added).

This Court should grant review to reduce the uncertainty about the nature and extent of federal reserved rights, thereby facilitating the resolution of pending and future adjudications.

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[27] As of 1995, there were more than 60 court cases pending involving Native American water rights, potentially affecting the distribution of more than 60 million acre-feet of water. *Water in the West*, 2-28.

[28] Huge amounts of private capital have been invested in the development of water resources. *California v. United States*, 438 U.S. 645, 649 n. 3, 655 (1978); *Bristor*, 255 P.2d at 175.

CONCLUSION

For the foregoing reasons, and for the other reasons stated in the Petitions for Certiorari, the Court should grant the Petitions for Writs of Certiorari.

Respectfully submitted March 13, 2000.

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